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October 27, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Notification*: Developing a Unified Intercarrier Regime, CC Docket No. 01-92

Dear Ms. Dortch:

In recent *ex parte* meetings at the Commission to discuss a proposed order in the above-docketed proceeding, the Commission staff inquired about the proper methodology to determine the "additional costs" incurred to terminate calls that originate on another carrier's network, which is the legal standard contained in section 252(d)(2) of the Communications Act of 1934, as amended ("Act").[1] We replied that the Commission properly concluded in the original *Local Competition Order*[2] that a TELRIC-based methodology should apply and that this methodology should include an allocation of forward-looking common costs.[3] Moreover, if the TELRIC-based methodology were to be replaced with a purely short-run incremental cost methodology, it would have grave

1 47 U.S.C. § 251(b)(5).

2 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, and *In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

3 *Id.*, at ¶¶ 1056-1058.

impacts on the deployment of facilities-based competitive networks, jeopardizing broadband deployment in contravention of the express goals of Section 706 of the Act.[4] In this filing, we elaborate on our response.

In two Notices of Proposed Rulemaking ("NPRMs") in above-docketed proceeding,[5] the Commission sought comment on whether it should use short-run incremental costs in calculating the "additional costs" of terminating calls.[6] In response, there were a paucity of comments, at least from the four Regional Bell Operating Companies ("RBOC"), who devoted most of their arguments to support of a "bill-and-keep" regime. Qwest was the only RBOC to comment on the use of short-run incremental costs, and it merely offered its opinion that the legal standard could be interpreted to include a short-run methodology without any discussion of the merits of such a methodology.[7] More instructive was the comment by Qwest that "setting prices at marginal cost would obviously leave the telecommunications company unable to recover its fixed costs."[8]

This comment has been echoed by the RBOCs in numerous other comments filed with the Commission. For example, SBC Communications, Inc.("SBC") has stated:

> Firms must be able recover their average costs over the long run or else they will go out of business … A model based on "short-run marginal cost," where prices would fall even below TELRIC levels, would be more incoherent still.[9]

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4 47 U.S.C. § 706.

5 *In the Matter of Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. Apr. 27, 2001) ("*ICC NPRM*"); *In the Matter of Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking (rel. May 3, 2005) ("*ICC FNPRM*").

6 *See ICC NPRM*, at ¶ 101; *ICC FNPRM*, at ¶ 73.

7 Comments of Qwest Communications International, Inc., CC Docket No. 01-92 (filed Aug. 21, 2001), at 42.

8 *Id.*, at 12.

9 Reply Comments of SBC Communications, Inc., WC Docket No. 03-173 (filed Jan. 30, 2004), at 14. It also is noteworthy that in its opening comments in this proceeding, SBC responded to the Commission's question about reconciling prices for unbundled network elements with pricing for terminating access by

BellSouth Corporation has similarly commented:

> Pricing at marginal cost for all services leaves the shared and common costs of the firm unrecovered. Such pricing is unsustainable, causing firms to exit, and is therefore not efficient in a dynamic sense. Prices can diverge from marginal costs in second-best fashion via multipart tariffs or Ramsey-efficient pricing.[10]

In contrast to the lack of any record in the above-docketed proceeding in support of the use of a short-run incremental cost methodology, the Commission has received recent *ex parte* filings from a number of interested parties – including the signatories to this letter – that the TELRIC methodology continues to be the appropriate methodology for establishing "additional costs."[11] twtelecom inc. and One Communications Corp., for instance, recently provided detailed support for the continued use of TELRIC.[12] The Commission thus has no reason to deviate from its conclusion reached in the *Local Competition Order* that the TELRIC methodology should continue to apply.

Finally, should the Commission adopt a short-run pricing methodology as the 'additional cost" standard, it would be in derogation of its mandate in section 706 to "encourage the deployment on a reasonable and timely basis of advanced

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noting that it advocates the adoption of bill-and-keep for the latter and not a short-run cost methodology. SBC thus seeks to dodge the obvious conclusion that if a short-run methodology applies to terminating access, it also should apply to the pricing of unbundled network elements. *See* Opening Comments of SBC Communications, Inc., WC Docket No. 03-172 (filed Dec. 16, 2003), at n. 105.

10 Reply Comments of BellSouth Corporation, WC Docket No. 03-172 (filed Jan. 30, 2004), at n. 6.

11 *See e.g.,* Letter from John J. Heitmann, Counsel for Nuvox, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 04-36 (filed Oct. 2, 2008); Letter from John J. Heitmann, Counsel for XO Communications Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 04-36, (filed Oct. 6, 2008).

12 Letter from Thomas Jones, Counsel to tw telecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 05-337, 99-68, 04-36 (filed Oct. 14, 2008).

telecommunications capability to all Americans."[13] As noted by the RBOCs, such a cost methodology does not permit the recovery of fixed costs in an industry that is characterized by enormous fixed costs. As a consequence, local exchange carriers throughout the United States would receive substantially lower returns, deterring any new investment, and those carriers may even be forced to exit the business. This would severely constrain the deployment of broadband networks at the very time when there is a consensus in the United States that broadband deployment must be accelerated.

Sincerely,

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[13] 47 U.S.C. § 706.